MINUTES OF THE BOARD OF POLICE COMMISSIONERS ORAL ARGUMENT TUESDAY, JUNE 26, 2012

An oral argument was held before the Board of Police Commissioners of Kansas City, Missouri on Tuesday, June 26, 2012, at Police Headquarters, 1125 Locust, Kansas City, Missouri.

PRESENT:

Commissioner Lisa T. Pelofsky, President Commissioner Angela Wasson-Hunt, Treasurer Commissioner Patrick A. McInerney, Member Mayor Sylvester "Sly" James, Jr., Member Mr. David V. Kenner, Secretary/Attorney Mr. James F. Ralls, Jr. Mr. Morgan Roach

NOT PRESENT:

Commissioner Alvin L. Brooks, Vice President

1. In the matter of the disciplinary proceedings of Police Officer

Anthony Melkowski.

This meeting was called to order at 8:08 a.m. by Commissioner Pelofsky.

Mr. David Kenner confirmed that no court reporter will record this oral argument; however, there will be audio and video of the proceedings. Counsel has agreed to waive the right to have these proceedings recorded by a court reporter.

The following appearances were entered: Morgan Roach for Officer Melkowski and James F. Ralls, Jr. for Chief Darryl Forté.

Mr. Kenner asked for confirmation that this oral argument is based on existing record and no additional evidence will be presented. Mr. Roach agreed on behalf of Officer Melkowski and Mr. Ralls agreed on behalf of Chief Forté.

Mr. Kenner said this oral argument is being held to present the positions of each side.

Mr. Ralls said this was a disciplinary action against Officer Melkowski for an incident that occurred November 2, 2006. While on patrol Officer Melkowski and his partner, Officer Tomas, encountered Michael Payne. Mr. Payne was considered a "red file" target and officers took Mr. Payne into custody. Officer Melkowski bent Mr. Payne over the hood of the patrol car and was held by the back of his hair because officers believed he had packets of crack cocaine in his mouth. Officer Melkowski then tried to extract the crack cocaine from Mr. Payne's mouth by using a PR-24 nightstick as a device to pry Mr. Payne's mouth open, which was captured on the in-car video camera. Mr. Ralls said this process went on for quite some time then Officer Melkowski suggested using a pen to extract the drugs.

The video showed that once Mr. Payne had swallowed the drugs, Officer Melkowski told Mr. Payne that he was going to die (from ingesting the drugs) and he did not call an ambulance. Profanity is used throughout the stop. Officer Ralls said Officer Melkowski use of force became excessive and he has a previous charge on his record for excessive use of force. Mr. Ralls said there is a risk factor to the public and the Department by allowing an officer with two excessive force complaints to continue working and it is clearly unacceptable.

Mr. Ralls said the hearing officer in this case, Robert G. Bailey, agreed that Officer Melkowski committed the acts for which the Chief brought the charges. However, the hearing officer did not feel that Officer Melkowski should be terminated.

Mr. Payne filed a complaint with the Office of Community Complaints and his complaint indicated that Officer Melkowski tried to pry his mouth open and pulled his hair while he was bent over the hood of the patrol car. Mr. Payne did not testify at the hearing. His whereabouts were unknown at the time.

Mr. Ralls said each of Officer Melkowski's commanders recommended that his employment should be terminated. Former Chief Corwin agreed with the recommendation.

Mr. Roach said it is his opinion that the Mr. Payne's statement taken by IAU is hearsay because Mr. Payne did not testify at the hearing. Mr. Roach said this case has had a fairly lengthy history and originally Officer Melkowski elected to have this case heard by a neutral hearing officer. Mr. Robert Bailey held a full evidentiary hearing on October 20, 2010, and he eventually issued a written decision. Mr. Bailey's ultimate determination was that Mr. Melkowski should be reinstated without back pay. Mr. Roach asked the Board to review and adopt this decision, and reinstate his employment with or without back pay. Mr. Roach said Officer Melkowski was asked to be a proactive narcotics officer and he was given this designation because he had proven to be good at the job. Mr. Payne was given the designation as a "red file" target which meant he had an extensive criminal record and a narcotic history.

Mr. Roach said all officers on this department have an obligation and duty to prevent citizens from harming themselves and to preserve and protect evidence and both of these concepts exist in this case. Every member of the chain of command agreed that there was a duty to protect the evidence and protect a citizen from harming himself.

Mr. Roach discussed Legal Bulletin 99-5, related to the use of reasonable force to prevent a subject from swallowing drugs. This legal bulletin was distributed department wide and provided guidance in the event of exigent circumstances by saying that such circumstances require the need for immediate action. Mr. Roach said Officer Melkowski was following the guidelines of the legal bulletin and had an obligation to act. Mr. Roach discussed cases as cited in the legal bulletin, the first being Taylor v. McDuffie, which holds as reasonable the use of a kubaton to apply to a suspect's face while another officer applies pressure point techniques. Two other cases are State v. Thompson and State v. Lomack which the court found the use of LVNR reasonable to retrieve drugs from a suspect's mouth. Mr. Roach said because these cases are "showcased" by the Department in the legal bulletin as examples of what is reasonable and that the legal bulletin is distributed to the officers. It is Mr. Roach's opinion that this document would be difficult to ignore which is what the chain of command did in this case. Each commander recommended termination of Officer Melkowski, however, none of the commanders indicated that they had read the legal bulletin before making the recommendation.

Mr. Roach asked the Board to disregard the commander's recommendations, review the legal bulletin to determine its applicability, and take it into serious consideration when making their decision.

Mr. Roach said the amount of force used by Officer Melkowski is less than set forth as reasonable by the legal bulletin. Hearing Officer Bailey also made this determination.

Mr. Roach quoted portions of Sgt. Ramona Arroyo's testimony when questioned about whether or not the legal bulletin is the document distributed by the Department that would control this situation and govern the level of force Officer Melkowski was authorized to use on Mr. Payne. She indicated yes. Additionally, she could point out no piece of language in the legal bulletin that Officer Melkowski violated. Mr. Roach also indicated that this action by Officer Melkowski resulted in no actual injuries to Mr. Payne and according to Sgt. Arroyo Mr. Payne's had no injuries, and his only complaint was his hair has been messed up.

Mr. Roach then quoted the hearing officer's finding Number 12.

Commissioner McInerney asked Mr. Ralls if it was appropriate to consider Officer Melkowski's previous suspension for excessive use of force to establish a pattern and that he acted consistently with the pattern in this case, or is it appropriate to consider the suspension as a practical matter and that it is a substantial Department liability to put him back on the street. Mr. Ralls said the second of the two is more important from the chain of command standpoint.

Mr. Roach disagreed with the notion that you can use a prior event to determine if a violation has occurred in a current event.

Mayor James asked Mr. Roach if he agreed that the Department would be in jeopardy if Officer Melkowski was back on the street and committed a third violation because Department had notice of proclivities to engage in such behavior. Mr. Roach said perhaps. Mayor James asked Mr. Roach if he was familiar with the issue of notice and he asked would the police department have notice of a propensity to engage in excessive force if Officer Melkowski, with two violations, were back on the street. The Mayor asked would this notice requirement in a civil lawsuit then be satisfied. Mr. Roach said the Mayor's question presupposes a second violation and he is asking the Board to determine that there has not been a second violation. Mayor James stated that any civil lawyer would say the need for this proceeding is evidence of a second violation.

Mr. Roach said what he tried to determine was whether or not there was a statutory cause for this particular offense and he believes that the evidence does not support the finding that there was cause for his termination based on what happened on November 2, 2006. Mr. Roach said if the Board finds a second violation based on this, then the issue of notice may be valid.

Mayor James asked Mr. Roach to clarify that he wants the Board to adopt the findings of the hearing officer, find there was no excessive force, and yet find there was a violation of some policy that would justify the withholding of back pay. Mr. Roach said the evidence for the withholding of back pay is for the

profanity and discourteousness. Mr. Roach agreed that their overall position is that the Board find no excessive force, reinstate Officer Melkowski, and make a decision on whether or not he will receive back pay.

Mr. Ralls said Mayor James is correct with regard to the issue of notice because the chain of command made the determination. Additionally, he said we cannot assume from the findings of the hearing officer that he thought there was a violation in terms of excessive force but rather he based his decision on the premise that directions given to Officer Melkowski were less than clear. With respect to whether or not there was excessive force, the hearing officer makes a specific finding that the Chief was justified in taking the action based upon the actions of Officer Melkowski.

Mr. Roach believes that the hearing officer does not dispute the evidence on the videotape and believes it is the Board's task to apply those facts to the policies in place.

Commissioner Wasson-Hunt asked when Officer Melkowski joined the force. Mr. Roach said November 1997. She also asked about the history of legal bulletins and wanted to know if these are given to the entrant officers. She stated that the legal bulletins are posted for two weeks and asked what happens to them after the two weeks. Mr. Ralls said they are put into a booklet which contains other various legal bulletins which are sometimes rescinded or replaced depending on changes to the law. He said with regard to this particular legal bulletin, it was in the context of law suits against the departments and individuals that these cases were making a determination; these were not disciplinary

hearings. These determinations were made in other states and other departments under other circumstances. He said the legal bulletin was put out as a guideline only.

Commissioner Wasson-Hunt asked if these legal bulletins are reviewed by entrant officers as part of the curriculum. Mr. Ralls said only if a particular instructor thinks it may be relevant to something they are presenting.

Mr. Kenner asked if there was any testimony that Officer Melkowski had read this particular legal bulletin. Mr. Roach said there was testimony that indicated Officer Melkowski was responsible for it. Mr. Ralls said there was nothing in the record that specifically said Officer Melkowski had read it.

Commissioner Pelofsky asked for an explanation of the normal procedure used if someone swallows drugs and the officer is unable to secure the drugs. Mr. Roach said at a minimum the officer should ask the person if they need an ambulance, which Officer Melkowski did in this case. Mr. Payne refused an ambulance and Officer Melkowski offered to drive him to the hospital and Mr. Payne declined that as well.

Commissioner Pelofsky asked what training Officer Melkowski has received to recognize signs and symptoms of overdose of someone who had swallowed drugs. Mr. Roach said there is nothing in the record that covers that, however, Officer Melkowski said he has not received any formal training on that.

Commissioner McInerney said this argument has been focused on the unnecessary force or violence, however, the second part of the use of force policy prohibits members from engaging in cruel, degrading, or inhumane

treatment of any person. He asked if Officer Melkowski disputes violating that portion of the policy. Mr. Roach said Officer Melkowski does dispute that and the hearing officer made a finding that all of Officer Melkowski's efforts were consistent with the legitimate intention of trying to preserve the evidence and remove it from Mr. Payne's mouth. Commissioner McInerney asked Mr. Roach if preservation of the evidence was the point of the initial contact with Mr. Payne. Mr. Roach said the initial reason was to do a standard pedestrian check. Commissioner McInerney asked if it was correct that after the initial contact, Officer Melkowski's actions with Mr. Payne were with respect to evidence recovery and not suspect safety. Mr. Roach said with Mr. Payne being a red file target and Officer Melkowski being proactive it is fair to say that Officer Melkowski wanted the evidence.

Commissioner McInerney said if the Board finds that the excessive use of force is ambiguous, would it not be possible for the Board to terminate Officer Melkowski for violation of the policy that dictates that he shall not engage in cruel, degrading or inhumane treatment. Mr. Roach said it is probably even more ambiguous that the Board could make that finding based upon this record. Mr. Roach said if the Board is referring to discourteousness and profanity, that is a different policy. Commissioner McInerney said he is referring to cruel, degrading and inhumane treatment. Mr. Roach said the comments on the videotape made by Officer Melkowski do not fall into this category.

Commissioner McInerney asked if the Board finds that Officer Melkowski did commit cruel, degrading and inhumane treatment against Mr. Payne, could

the Board terminate him on that basis alone. Mr. Ralls said yes, and said there is no doubt that after reviewing the videotape that the Board will find that Officer Melkowski makes every effort to be degrading to Mr. Payne. He said the overall actions in this case, just in the video alone, can lead you to that conclusion.

Mayor James asked about the actions of the other officers at the scene. He asked if Officer Toma was there for the duration and Mr. Roach said yes he was. Mr. Toma's testimony said he was unwilling to put forth the effort to try and get the drugs and he said Officer Melkowski was putting forth the extra effort.

Mayor James asked if Officer Lynn attempted to assist Officer Melkowski in removing the drugs from Mr. Payne's mouth. Mr. Roach said he did assist and then left. Officer Lynn's testimony indicated that while there he saw nothing unreasonable or excessive.

Mr. Ralls said the chain of command focused on both of these things and from their review of the videotape it appeared to them that Officer Tomas was uncomfortable with the manner in which this was proceeding and tried on several occasions to ask Officer Melkowski to stop. Everyone in the chain of command agreed with this and pointed out Officer Lynn's stop at the scene and his leaving shortly thereafter.

Mr. Kenner said if Mr. Roach is relying on the legal bulletin as a defense, there is nothing in the testimony that says Officer Melkowski had read the bulletin even though he was using the techniques described in the bulletin as the limits on what he was permitted to do. Mr. Roach said Officer Melkowski said that

being a narcotics officer the legal bulletin would have been a document that he would have read.

Mr. Kenner said the hearing officer recommended that Officer Melkowski be put on probation for a year and asked if policy allowed this. Mr. Ralls said the problem with a hearing officer is that he is asked to make findings of fact and he goes beyond that in terms of police procedure. The Chief has the power to make such determinations, however, Mr. Ralls does not believe that the hearing officer was looking at any of the police procedures with regard to follow up action in this case. Mr. Kenner said it is Mr. Roach's position that per statute, an officer can be on probation when first appointed, however, no probationary options are available after that. Mr. Ralls said technically that may be true, however, there may be circumstances where the Chief may decide otherwise. In this particular case, however, the Chief determined that termination is the only remedy available because of Officer Melkowski's prior actions and the actions on the videotape.

Mr. Payne brought a claim against the department and Mr. Kenner asked if it has been resolved. Mr. Roach said none of this is in the records. Mr. Ralls said there is nothing about a claim in the records, however, the complaint Mr. Payne filed with OCC is part of the file.

Mr. Kenner asked if either attorney wanted to submit any post hearing briefs. Mr. Ralls and Mr. Roach said they do not want to file any additional briefs.

This oral argument ended at 9:05 a.m.

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ary/Attorney		